Diagram 1: Access Charge in Dispute

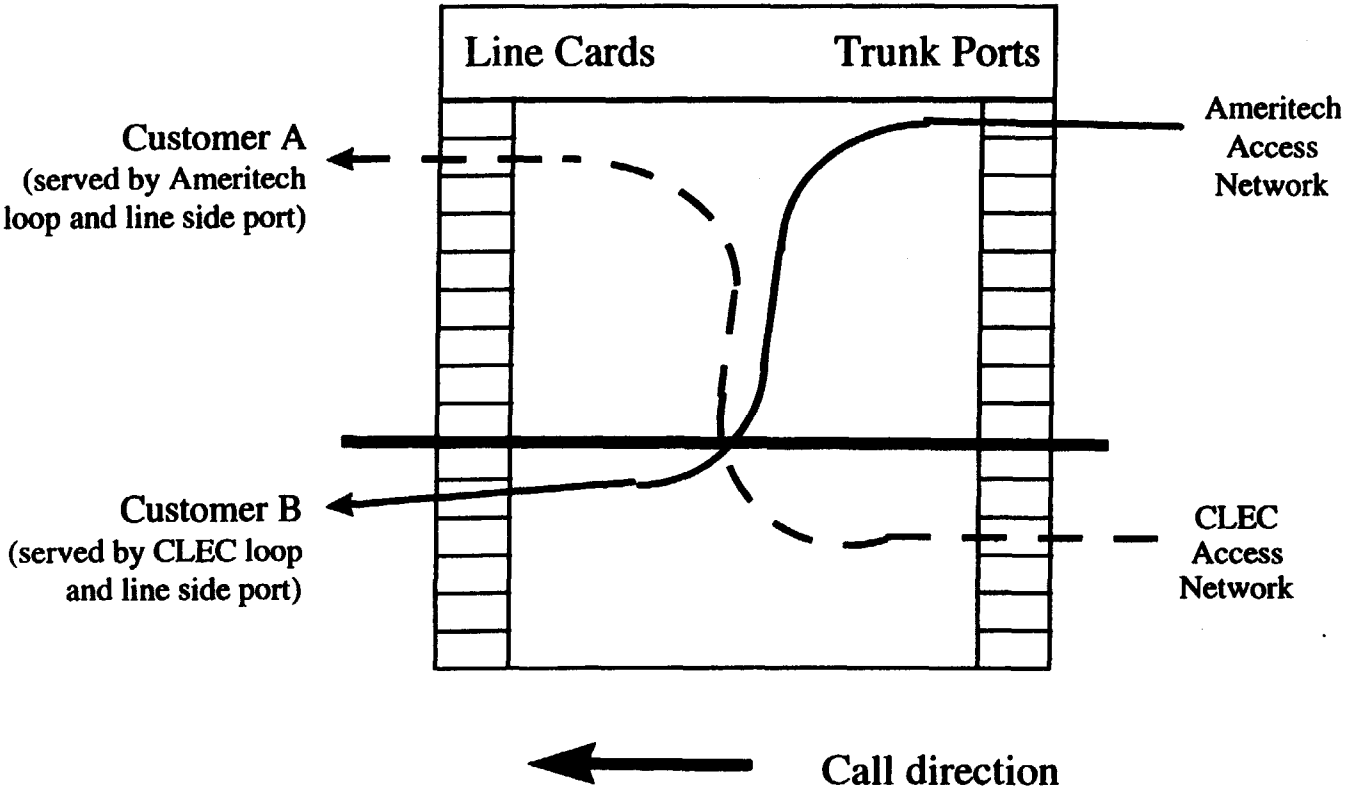


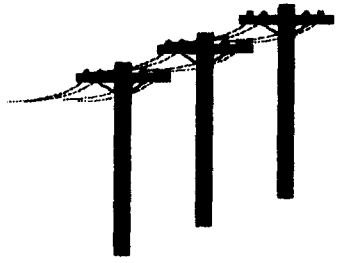
Diagram 2: Elements of Access

Traditional Access Charges:

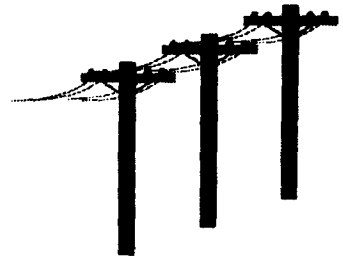
Local Loop
- CCLC

Local Switching
- LS2
- Info Surcharge
- FGD Blocking
- RIC*

Transport
- Trans. Termination
- Trans. Facility
- RIC*



LEC CO (Switch)



IXC POP

Unbundled Elements:

Local Loop
- Unbundled loop

Local Switching
- Line card (port)
- ULS

Transport
- DSX charges / ports
- Cross connect
- Transport
- DSX at tandem
- Tandem switching
- Tandem port charges

* The RIC recovers transport related revenue streams foreclosed from ILEC recovery by local tranport restructure, but is charged as an add-on to local switching per minute charges.

Appendix C
Docket 6720-TI-120

EXHIBIT 3

ICC Revised Second HEPO

Illinois Commerce Commission, Investigation concerning Illinois Bell Telephone Company's compliance with Section 271(c) of the Telecommunications Act of 1996, Docket No. 96-0404, Hearing Examiner's Revised Second Proposed Order (June 20, 1997)

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On its Own Motion	:	
	:	96-0404
Investigation concerning Illinois Bell Telephone	:	
Company's compliance with Section 271 (c)	:	
of the Telecommunications Act of 1996.	:	

HEARING EXAMINER'S REVISED SECOND PROPOSED ORDER

JUNE 20, 1997

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On its Own Motion	:	
	:	96-0404
Investigation concerning Illinois Bell Telephone	:	
Company's compliance with Section 271 (c)	:	
of the Telecommunications Act of 1996.	:	

HEARING EXAMINER'S SECOND PROPOSED ORDER

By the Commission:

I. INTRODUCTION

On August 26, 1996, we issued our Order Initiating Investigation ("OII") commencing this docket. As stated in the OII, this docket was initiated to gather information regarding the compliance of Illinois Bell Telephone Company, d/b/a Ameritech Illinois ("Ameritech"), with Section 271(c) of the federal Telecommunications Act of 1996 ("Act"), 47 U.S.C. § 271(c). The purpose for gathering this information is to fulfill our consulting role with the Federal Communications Commission ("FCC") under Section 271(d)(2)(B) when Ameritech applies for FCC authorization to provide in-region interLATA telecommunications services.

Toward this end, we attached as Appendix A to our OII a list of thirty questions/areas of inquiry that we directed the parties to address in this docket. Because much of the information that we seek is in the possession of Ameritech or other telecommunications service providers to whom we have granted certificates of service authority under Section 13-405 of the Illinois Public Utilities Act ("IPUA"), we named as parties to this docket all such certificated service providers. Specifically, we made Ameritech and the following service providers parties to this docket: AT&T Communications of Illinois, Inc. ("AT&T"), A.R.C. Networks, Inc.; Ameritech Advanced Data Services of Illinois, Inc.; Consolidated Communications Telecom Services, Inc. ("CCT"); Diginet Communications Inc. - Midwest Digital Services Corporation, d/b/a Virginia Digital Services Corp.; LCI International Telecom Corp.; MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc. (collectively "MCI"); McLeod Telemanagement, Inc.; MFS Intelenet of Illinois, Inc. ("MFS"); Microwave Services, Inc.; One Stop Communications, Inc.; Preferred Carrier Services, Inc.; SBMS Illinois Services, Inc.; Sprint Communications L.P., d/b/a Sprint Communications Company ("Sprint"); TCG Illinois, Inc. ("TCG"); TCI Telephony Services

of Illinois, Inc.; Telefiber Networks of IL, Inc.; U.S. OnLine Communications L.L.C.; USN Communications, Inc. ("USN"); Winstar Wireless of Illinois, Inc.; and Worldcom, Inc.

Pursuant to notice, as required by law and the rules and regulations of the Commission, pre-hearing conferences were held before a duly-authorized Hearing Examiner of the Commission at its Chicago offices on September 11, October 1, October 4 and December 2, 1996. The following parties petitioned for and were granted leave to intervene by the Hearing Examiner: the Illinois Telephone Association ("ITA"); the Illinois Independent Telephone Association ("IITA"); the Illinois Attorney General on behalf of the People of the State of Illinois ("IAG"); the Telecommunications Resellers Association ("TRA"); Consolidated Communications, Inc.; the Competitive Telecommunications Association ("CompTel"); the Citizens Utility Board ("CUB"); the Cable Television and Communications Association of Illinois; and Access Network Services, Inc. ("Access"). The Illinois Commerce Commission Staff ("Staff") also appeared and actively participated in this docket.

Evidentiary hearings were held on January 13-17 and January 21, 1997. ~~At the conclusion of the latter hearing, the record was marked Heard and Taken.~~ On March 6, 1997, a Hearing Examiner's Proposed Order was issued. To permit the development of a complete record, Ameritech Illinois proposed and the Commission approved a supplemental round of proceedings to respond to the issues raised in the Proposed Order and to generally provide the Commission with up-dated information. Additional evidentiary hearings were held on May 6-7, 1997.

Messrs. David Gebhardt, John Gregory Dunny, Wayne Heinmiller, Scott Alexander, .Ramont Bell , John Pautlitz, Warren Mickens, and Joseph Rogers, Robert H. Meixner ~~and~~ Ms. Lisa Robertson and Ms. Rachel Foerster filed testimony on behalf of Ameritech.

Testimony was filed on behalf of the Staff by Ms. Charlotte TerKeurst, Mr. Jake Jennings, Ms. Stacy Buecker, Mr. S. Rick Gasparin, Mr. Samuel McClerren, ~~and~~ Mr. Sam E. Tate, Mr. Christopher Graves~~.~~

Testimony on behalf of AT&T was filed by Messrs. John Puljung, Wayne Fonteix, Robert Falcone, Michael Pfau, William Lester, Timothy Connolly, and Mr. Michael Starkey, and Ms. Judith Evans.

Testimony on behalf of MCI was filed by Mr. Carl Giesy.

Testimony on behalf of Sprint was filed by Ms. Betty L. Reeves and Dr. Carl Shapiro.

Testimony on behalf of CompTel was filed by Mr. Joseph Gillan.

Testimony on behalf of MFS was filed by Ms. Ruth Durbin.

Testimony on behalf of CCT was filed by Mr. Scott Jennings.

Before turning to a discussion of the information presented by the parties and Staff and the conclusions that we deduce from that information, it is important to recognize the unique nature of this docket. The purpose of this docket is not to adjudicate the rights of any party per se. Rather, as noted above, the purpose of this docket is to gather information regarding Ameritech's compliance with Section 271(c) in order to fulfill our consulting role with the FCC under Section 271(d)(2)(B) of the Act.

While our information-gathering mission is primarily factual in nature, we note that there is little, if any, dispute between the parties regarding the underlying facts presented in this docket. Many of the core disputes in this docket involve legal issues regarding the interpretation, and application to the record facts, of the provisions of Section 271(c). We acknowledge, of course, that the determination of how Section 271(c) should be interpreted and applied is ultimately within the FCC's domain, and not ours. However, in order to provide the FCC with meaningful and timely comments as part of our consulting role, and in the absence of any prior pronouncements by the FCC regarding how Section 271(c) should be interpreted and applied, we cannot avoid addressing certain of these legal issues, even if our conclusions on these issues are non-binding.

II. LEGAL ISSUES REGARDING INTERPRETATION AND APPLICATION OF SECTION271(c)

A. SECTION 271 REQUIREMENTS IN GENERAL

Section 271(a) provides that neither a Bell Operating Company ("BOC") nor any affiliate of a BOC may provide interLATA services except as provided in Section 271. 47 U.S.C. §271(a). Section 271(b)(1) provides that a BOC, or any affiliate of that BOC, may provide interLATA services originating in any of its in-region States if the FCC approves the application of such company under Section 271(d)(3). 47 U.S.C. §271(b)(1). Section 271(d)(1) authorizes a BOC or its affiliate to apply to the FCC on or after the date of enactment of the 1996 Act for authorization to provide interLATA services originating in any in-region State. 47 U.S.C. §271(d)(1).

Under Section 271(d)(3), the FCC must issue a written determination and state the basis for approving or denying the requested authorization within 90 days after receiving an application under Section 271(d)(1). 47 U.S.C. §271(d)(3). Section 271(d)(3) also provides that the FCC shall not approve the authorization requested in a Section 271(d)(1) application unless it finds that:

> (A) the petitioning Bell operating company has met the requirements of subsection (c)(1) and--

> (i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A), has fully implemented the competitive checklist in subsection (c)(2)(B); or
>
> (ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B), such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B);
>
> (B) the requested authorization will be carried out in ~~accordance with the requirements of section 272~~; and
>
> (C) the requested authorization is consistent with the public interest, convenience, and necessity.

47 U.S.C. §271(d)(3).

Section 271(d)(2)(B) requires the FCC to "consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c)." 47 U.S.C. §271(d)(2)(B) ~~(emphasis added)~~. Thus, the explicit role of the Commission in an application by Ameritech for the FCC to authorize it to provide in-region interLATA services under Section 271(d)(1) is to "consult" with the FCC so as to verify whether Ameritech has complied with the requirements of Section 271(c). Section 271(d)(2)(A) requires that the FCC also notify and consult with the Attorney General regarding any application under Section 271(d)(1). 47 U.S.C. §271(d)(2)(A). The United States Department of Justice ("DOJ") requested the Commission to gather certain information in order to aid the DOJ in the Attorney General's evaluation of Ameritech's anticipated application for authorization to provide in-region interLATA services. Illinois Commerce Commission (On Its Own Motion), Ill. C.C. Docket No. 96-0404, Order OII at 2.~~Initiating Investigation, p. 2 (August 26, 1996) ("Order Initiating Investigation")~~. This docket was initiated by the Commission in order to properly discharge its role as consultant to the FCC and as an information gatherer for the DOJ on matters related to Ameritech's compliance with Section 271 ~~OIIrder Initiating Investigation,~~ at. 3~~-4~~.

B. SECTION 271(c) REQUIRMENTS

Section 271(c) sets forth the preconditions for BOC entry into the in-region interLATA services market. 47 U.S.C. §271(c). As noted above, the 1996 Act requires the FCC to consult with this Commission in order to verify Ameritech's compliance with

the requirements of Section 271(c). The preconditions under Section 271(c) are interrelated and consist of the following principal requirements. First, a BOC must establish the presence of at least one facilities-based competitor (serving business and residential customers) to which it is providing access and interconnection pursuant to an approved interconnection agreement, or that no such provider has requested access and interconnection and it is offering access and interconnection pursuant to a statement of generally available terms ("SGAT" or "statement") which a State commission has approved or permitted to take effect. 47 U.S.C. §271(c)(1)(A) and (B). Second, a BOC must establish that it "is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A) [of Section 271(c)]," or that it "is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B) [of Section 271(c)]," and that "such access and interconnection meets the requirements of [the competitive checklist] 47 U.S.C. §271(c)(2)(A).

The issues before the Commission in this matter are primarily issues of statutory interpretation of Section 271. Following is a discussion of the disputed provisions of Section 271.

C. "IS PROVIDING"

The Commission raised the issue of whether Ameritech must actually provide each checklist item in its Question No. 13. Ameritech maintains that a BOC "provides" a given checklist item pursuant to Sections 271(c)(2)(B) either by actually furnishing the item to carriers that have ordered it or by making available that item, through an approved interconnection agreement, to carriers that may elect to order it in the future. Ameritech contends that this construction of "provide" is mandated by the text, structure and legislative history of the Act; by standard dictionary definitions of "provide"; and by judicial decisions, from Illinois and elsewhere, that consistently interpret the statutory term "provide" to mean "make available" and reject contentions that the term means only "furnish" or "supply."

Ameritech also explained why Staff's and the interexchange carriers' contrary view — which holds that "provide" means exclusively "actually furnish" and not "make available" — would lead to absurd consequences that Congress could not possibly have intended. Were this contrary view adopted, Ameritech argues that it would be indefinitely barred from obtaining Track A relief if, through no fault of Ameritech, no competing carrier elected to purchase a given checklist item.

Staff takes the position that the most reasonable interpretation of the term "is providing" in Section 271(c)(1)(A) is that Ameritech actually must provide the access and interconnection on a commercial basis, in which the competing carrier is obtaining, using, and (where relevant) paying for the checklist item. Staff contends that Congress used the phrase "is providing" with respect to agreements under Track A, and the phrase "is generally offering" with respect to a statement under Track B. Staff contends that if

Congress intended "provide" to mean "offer", it would not have used different terms to describe the same requirement with respect to agreements and statements.

Staff states that its position is further supported by the exception to the "no request" requirement in Section 271(c)(1)(B) for failure to implement an agreement. See 47 U.S.C. §271(c)(1)(B). Staff argues that Section allows a BOC to proceed under Track B and rely upon a statement if the only provider or providers making such requests have "violated the terms of an agreement approved under Section 252 by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement." 47 U.S.C. §271(c)(1)(B). Accordingly, Staff states that if the standard were truly only "offer" or "make available", there would be little need for the exception to proceed under Track B as a BOC would be offering and making available the terms of any approved interconnection agreement irrespective of whether the competitive provider had implemented the agreement by taking the services provided thereunder.

Staff witness Charlotte TerKeurst also provided policy reasons to interpret the term "is providing" as Staff recommends. She testified that a host of problems and obstacles could prevent a carrier that has signed an interconnection agreement from actually receiving the services outlined in the contract. Further, she testified that Ameritech may have incentives to delay contract performance if it can obtain interLATA entry in the meantime. She also testified that an agreement may have checklist items in it that the new entrant does not seriously plan to use. If that is the case, she testified that the new entrant may not have bargained vigorously for the prices, terms, and conditions attached to the checklist item.

Ms. TerKeurst testified that, in order for Ameritech to meet the requirement that it is providing a checklist item, the competing carrier should be able to order and receive the item in sufficient quantities and in a manner that will allow it to provide service to its own customers on a commercial basis. Staff Ex. 1.01, at 9; Tr. 1442-1443. She further testified that the manner in which Ameritech provides the service should be adequate to meet the new carriers' need and should not hinder their ability to operate. Tr. 1507. The competing carriers should be able to do reasonable marketing and be able to sign up and provide service to the customers that respond to their marketing. Tr. 1508.

Staff also contends that its interpretation of "is providing" is consistent with the intent of Congress as expressed in the language of the Act. Moreover, Staff states that its interpretation is consistent with Congress' focus on the actual provision (rather than offering) of service to a facilities-based competitor pursuant to an approved agreement. Staff cites the Conference Report which notes that the facilities-based competitor requirement of Section 271(c)(1)(A) adopted by the conference agreement "comes virtually verbatim from the House amendment." H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 147 (1996). Staff further states that the basis for the House amendment was described in the House Report by the Committee On Commerce as follows:

> Under Section 245(a)(2)(A) [which was eventually adopted as Section 271(c)(1)(A)], the Commission must determine that there is a facilities-based competitor that is providing service to residential and business subscribers. This is the integral requirement of the checklist, in that it is the tangible affirmation that the local exchange is indeed open to competition. In the Committee's view, the "openness and accessibility" requirements are truly validated only when an entity offers a competitive local service in reliance on those requirements.
>
> * * *
>
> The Committee expects the Commission to determine that a competitive alternative is operational and offering a competitive service somewhere in the State prior to granting a BOC's petition for entry into long distance. The requirement of an operational competitor is crucial because, under the terms of section 244 [See Section 252(i)], whatever agreement the competitor is operating under must be made generally available throughout the State.

H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 76-77 (1995).

Sprint contends, that as used in the Act, the word "providing" means actually furnishing the item to a competing carrier. Sprint agrees with Staff's construction of "to provide." Sprint asserts that the language of the Act supports this conclusion since throughout Section 271, Congress specifically and carefully distinguished between the active provision of access and interconnection required under Track A and the offering of access and interconnection required by Track B. Sprint points out that the legislative history indicates that Congress intended for new LECs to be "operational." S. Rep. No. 230, 104th Cong. 2d Sess. 148.

MCI also accepts the Staff's construction of "to provide" as meaning to provide on a commercial basis, and that the competing carrier is obtaining, using and (where relevant) paying for the checklist item.

Commission Conclusion

It must again be noted that the Commission's role with respect to the Section 271 checklist is advisory in nature. Although, this Commission must make its own interpretation of "is providing" in order to develop a standard for determining whether the checklist is met, the main purpose of this Order is to advise the FCC and the DOJ with respect to the current state of competition in the State of Illinois. We believe that this Order accomplishes this mission.

The Commission is of the opinion that Section 271 must be read as a whole in order to determine the meaning of the words "is providing" in Section 271(c)(1)(A). In order for Section 271 to serve a purpose , it must provide a meaningful avenue for a BOC to eventually enter the long distance market. Furthermore, it must be interpreted in a manner that sets goals for the BOC to meet in order to achieve this result.

The interpretation of Section 271 offered by Staff and the IXCs would indeed indefinitely bar Ameritech from entering the long distance market. This is because, first of all, it is unlikely that facilities-based providers will ever request every checklist item and Staff acknowledges this. Second, under the interpretation of Staff and the IXC's "Track B" is not an option because Ameritech already has received requests for access and interconnection pursuant to "Track A."

Section 271(c)(1)(A) must be interpreted in a manner that allows Section 271 to make sense as a whole. The Commission does not believe that Congress conceived this section to bar a BOC from ever entering the interLATA market. This is an unreasonable result that would make a BOC's filing of a Section 271 application a worthless exercise. Accepting the interpretation of Staff and the interexchange carriers ("IXC") of Section 271(c)(1)(A) would also result in removing the inherent incentive that the checklist provides for Ameritech to facilitate local competition.

In addition, we feel that Congress did not intend to place the power to allow a BOC to enter the interLATA market in the hands of its competitors. Read as a whole, Section 271 places incentives on the BOC to make its best effort to meet the checklist. In fact, this "carrot and stick" approach is working extremely well in Illinois. The record indicates that Ameritech has worked a fast pace to put in place the various checklist items.

We agree with Ameritech that the term "provide" in Section 271(c)(2)(B) means either "actually furnish" or "make available." We, however, go further than Ameritech as to the meaning of "making available." We will deem an item "available" only when we find with substantial certainty that each of following standards are met with respect to a given checklist item:

1. the item is currently available and can be ordered immediately and the competing carrier can receive, within a reasonable time, the item in sufficient quantities and in a manner that will allow it to provide service to its own customers on a commercial basis;

2. all systems necessary are in place allowing Ameritech to immediately provide said item and in instances where said item has been ordered or requested it is actually being furnished;

3. if applicable, thorough internal testing of said item ~~all testing necessary~~ has been completed and where possible, carrier-to-carrier testing has also been completed ~~with respect to said item~~;

4. this Commission is confident ~~substantially certain~~ that the checklist item will function as expected;

5. said item can be provided to the requesting party on a non-discriminatory basis and at a quality level that is at parity with the quality that Ameritech itself receives;

In essence, for this Commission to consider that a particular checklist item is being provided immediately, there must be little doubt that the item can be provided without significant glitches or problems.

Our interpretation of "is providing" is consistent with the fact that a "Track B" exists. Congress was clearly content with allowing a BOC to enter the interLATA market through the use of its SGAT without it actually furnishing the checklist items. Staff and the IXC's place an inordinate amount of importance on the actually furnishing standard when Congress felt that it was not absolutely necessary by establishing a Track B alternative.

Staff's argument that Track B is not needed if "is providing" were interpreted as meaning "making available" is misplaced. The Commission is of the opinion that our definition of "providing" is more substantial than merely "offering" the item. In Track A we are concerned with how the item is being provided or how it will be provided. For example, a carrier that is not facilities-based may order a checklist item. Under Track A we are considering how that item is being provided to this non-facilities based carrier. We are not only considering the fact that the item exists for ordering, but also assessing the quality of the actual item as it is being provided or as we feel it will be provided. Track B does not address these questions.

Finally, the legislative history cited by Staff does not define "is providing." A close reading indicates that Congress intended that an operating facilities-based provider exist in order for Track A to be met. This is a requirement, whether or not Staff's interpretation of "is providing" is adopted. No party has cited legislative history stating that a facilities-based carrier must actually be furnishing each checklist item.

D. RESIDENTIAL AND BUSINESS SUBSCRIBER REQUIREMENT OF SECTION 271(c)(1)(A)

Ameritech states that it has satisfied the requirement that the competing providers serve residential and business customers. It cites Section 271(c)(1)(A) stating that the agreement or agreements entered into by the BOC must specify the terms and conditions under which access and interconnection is provided to "one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers." Section 271(c)(1)(A).

Ameritech contends that it has satisfied the "business and residential" requirement of Section 271(c)(1)(A) because CCT currently serves both business and residential customers. (CCT Ex. 1 at. 5; Staff Ex. 1.00 at 25). Ameritech contends that the Commission has certificated MFS and TCG to provide local exchange service to both business and residential customers. (MFS Ex. 1 at 19). Ameritech maintains that although it appears that MFS and TCG presently have only business subscribers to their local exchange service, MFS witness Durbin stated that MFS "hopes to have residential subscribers in the near future." (MFS Ex. 1, at 20).

Staff argues that it is not enough to simply have an agreement with a carrier that serves residential and business customers. Rather, Staff states that a BOC must satisfy each of the checklist items based on the access and interconnection which it is providing pursuant to an agreement or agreements which satisfy the residential and business subscriber requirement.

Staff contends that the Act contains a two-part test with respect to residential and business subscribers. The Act not only requires an agreement with a carrier serving business and residential customers, but also requires that the access and interconnection provided pursuant to such an agreement or agreements satisfies the competitive checklist. Staff argues that Ameritech's argument ignores the second part of the test.

Staff contends that based upon the fact that CCT serves both residential and business customers and is the only carrier currently serving residential customers, consideration of the MFS and TCG agreements (which involve carriers only serving business customers) would not produce "additional progress in meeting the checklist." Thus, Staff states that the only relevant agreement for purposes of determining checklist compliance is the CCT agreement.

MCI contends that neither CCT, MFS nor TCG can be considered a "competing" provider of local exchange service because, even combined, those three carriers serve a minuscule portion of the Illinois local exchange market. MCI contends that to qualify as a competitor, a carrier must serve both residential and business customers on a reasonably widespread basis. MCI defines a "reasonably widespread basis" to mean that a sufficient number of residential and business customers are being served to demonstrate that Ameritech's "bottleneck" is broken. MFS and TCG serve only business customers in Chicago. Moreover, CCT serves the limited geographic areas of Springfield, Decatur and Champaign, and even in those areas it serves less than 4% of local exchange customers. Based on this level of competition, or lack thereof, MCI believes that it is premature to conclude that Ameritech has met the requirements of Section 271(c)(1)(A) since it would tend to "trivialize" the requirements of subparagraph (A).

Similar to MCI, MFS argues that neither CCT's TCG's nor MFS' share of the business and residential market is suffice for any of these three carriers to be considered "competing" carriers. MFS points out that CCT serves only 7,000 access lines in Illinois in contrast to Ameritech's 6,397,349. Thus, MFS notes that consumers, whether business

or residential, do not have a real choice in the local exchange market. Since the local market is not open to competition, MFS argues that the Commission need not reach the larger question of whether MFS, CCT or TCG are "facility based."

CompTel agrees with MCI and MFS that the competing provider requirement in Section 271(c)(1)(A) was not intended to be a token requirement that can be satisfied by the signing of an interconnection agreement, but was intended to ensure that the Act is working as Congress intended: to foster competition. CompTel contends that the record is uncontested that real competition is not present in the Illinois local exchange market. CompTel further contends that because Ameritech has not satisfied the checklist, the Commission need not reach the larger question of whether any Illinois LEC is a competing facilities-based provider.

Sprint similarly contends that Ameritech has failed to meet the "competing carrier" requirement because there is no real competition in the Illinois local exchange market. In support of its argument, Sprint points out that CCT serves approximately 1/10th of 1% of the access lines served by Ameritech. Sprint also points out that based on 7,000 access lines, CCT serves only 4,550 residential customers and 2,450 business customers in Illinois.

Ameritech replies that these positions on this issue are wrong as a matter of law and policy. It asserts that nothing in the statutory language requires that both residential and business customers be served by the same competitor. Ameritech further states that the Act was designed to ensure that the local exchange is open to competition. Ameritech asserts that that objective is served whether there is a single competitor serving both residential and business customers or, for example, two competitors, one serving business customers and the other serving residential customers. It further states that there is no good reason, then, for refusing to permit a BOC to satisfy the "business and residential" requirement through a combination of Section 271(c)(1)(A) agreements.

Ameritech further argues, however, that in the end, the question of whether MFS and TCG "count" in determining whether it has satisfied the "business and residential" requirement is academic. Ameritech states that this is because it is undisputed that CCT furnishes local service to both business and residential customers – and this is all that the Act requires.

Commission Conclusion

Section 271(c)(1)(A) requires a BOC to demonstrate that it has entered into "one or more binding agreements . . . specifying the terms and conditions under which the [BOC] is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers." 47 U.S.C. §271(c)(1)(A). The Commission agrees with Staff that this section requires that only carriers serving <u>both</u> business and residential customers qualify under Section 271(c)(1)(A).

It is undisputed that only CCT serves both residential and business customers, while MFS and TCG serve only business customers. Based on the fact that CCT serves both residential and business customers and is the only carrier currently serving residential customers, consideration of the MFS and TCG agreements (which involve carriers only serving business customers) would not produce additional progress in meeting the checklist. Thus, the only relevant agreement for purposes of determining checklist compliance is the CCT agreement.

The Commission rejects the IXCs' arguments regarding the amount of customers that CCT serves. Section 271 clearly lacks any mention of a "metric" test. Such a test could have been included in this Section, but its omission indicates that Congress did not intend one.

E. THE FACILITIES-BASED COMPETITOR REQUIREMENT OF SECTION 271(C)(1)(A)

Ameritech states that it has satisfied the requirement in Section 271(c)(1)(A) that the competing carrier or carriers offer service "either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier." It asserts that a facilities-based provider is one that supplies service to its customers, uses facilities and equipment to which it has title, or that purchases access to such facilities and equipment from any other entity (including Ameritech) and thereby obtains the use of such facilities and equipment for the purchase period. Ameritech states that CCT, MFS, and TCG satisfy the "predominantly facilities-based" requirement because they offer telephone exchange service predominantly over their own facilities.

Ameritech asserts that CCT, MFS and TCG are facilities-based providers under Section 271(c)(1)(A). It states that it is clear from the plain language of Section 271(c)(1)(A) that Congress used the term "their own" to distinguish between a pure reseller of telephone exchange services and a facilities-based competitor offering services pursuant to interconnection agreements. Ameritech further states that the statute provides that, to qualify as a facilities-based carrier, competing providers must offer telephone exchange service either (1) "exclusively over their own telephone exchange service facilities," or (2) "predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier." Section 271(c)(1)(A) (emphasis added). Ameritech contends that the statute juxtaposes two (and only two) alternative arrangements for competing carriers to provide telephone exchange service — first, "over their own" facilities, and, second, through "the resale of the telecommunications services of another carrier." Accordingly, Ameritech argues that Congress defined "facilities-based" competition in telephone exchange services by what it is not: the "resale" of telephone exchange services provided over facilities controlled exclusively by a BOC.

Ameritech further contends that it follows that unbundled network elements leased to competitors must be categorized as "their own facilities," because services provided by those competitors over network elements that they control through lease arrangements do not constitute "the resale of the telecommunications services of another carrier." It states that Congress did not intend to limit the definition of "facilities-based competition" to competition from entities that have title to the network facilities over which the competitive services are provided. Ameritech asserts that this is because the statutory text demonstrates this to be true. It opines that Section 271(c)(1)(A) does not require that service facilities be "owned by" the competing providers. Rather, it states that the facilities must be "their own." Ameritech, therefore, contends that this language describes a property interest characterized by control, which a lease grants, rather than possession of a title interest.

Ameritech argues that the critical focus of Section 271(c)(1)(A) is control over not title to network elements. It cites the FCC's Regulations which preclude an incumbent LEC from imposing limitations on a competing provider's use of network elements to offer service. 47 C.F.R. § 51.309(c) ("[a] telecommunications carrier purchasing access to an unbundled network facility is entitled to exclusive use of that facility for a period of time, or when purchasing access to a feature, function, or capability of a facility, a telecommunications carrier is entitled to use of that feature, function, or capability for a period of time"). Thus, Ameritech argues, the Regulations make clear that "exclusive use" or control of network elements is the hallmark of a "facilities-based" competitor. Ameritech states that when a BOC complies with the Act and the FCC's Regulations, as a matter of law it has effectively transferred control over leased network elements to the competitor. It asserts that by statutory and regulatory definition, the leased elements become the competitor's "own" facilities.

Thus, Ameritech maintains that CCT, TCG and MFS qualify as "predominantly facilities-based" providers under Section 271(c)(1)(A). Ameritech notes that CCT serves only a small portion of its access lines on a resale basis entirely through Ameritech's facilities; the vast majority are served either entirely through facilities to which CCT has title or through such facilities in conjunction with unbundled elements obtained from Ameritech. Ameritech states that it does not appear that TCG serves <u>any</u> customers through resale. And, finally, it asserts that a majority of MFS's access lines are served either entirely through facilities to which MFS has title, or through such facilities in conjunction with unbundled elements obtained from Ameritech.

Staff witness TerKeurst testified that a direct measure of determining whether a carrier is predominantly facilities-based could be based on a relative LSRIC test. For a carrier serving customers over its own facilities, unbundled loops, and resale, a weighted average based on the percent of the carrier's own facilities could be calculated. If the weighted average is over 50%, then the carrier could be deemed serving customers over its own facilities. Staff witness Jennings, however, could not conduct such a test because Staff contends that insufficient information was available. Instead, Mr. Jennings relied upon information submitted solely by Ameritech regarding the embedded investment

dollars of central office cable, wired loop investment and other facilities-based investment. Based on the information supplied by Ameritech, which relied heavily on embedded costs, Staff concluded that between CCT, MFS and TCG, only CCT could possibly be serving customers "predominately" over its own facilities.

In addition, Staff argues that Ameritech's inclusion of unbundled network elements in its definition of a carrier's "own" facilities is not supported by the statutory language, the legislative history or sound policy. Staff contends that Ameritech's definition would lead to the illogical result that a carrier is "facilities-based" even if it has not purchased and installed a single switch, loop or other facility -- so long as it is using unbundled network elements to a greater extent than it is using resale to provide service to end users. Staff asserts that this is contrary to the language of Section 271(c)(1)(A). Staff contends that the provision specifying that a carrier offer its services exclusively or predominantly over its own facilities ~~explains the meaning of the sentence which~~ requires a BOC to establish that it "is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service . . to residential and business subscribers." 47 U.S.C. §271(c)(1)(A) (emphasis added). Accordingly, Staff states that it is illogical and unreasonable to suggest that unbundled network elements owned by a BOC should be treated as the "facilities and equipment" of the competitor for which a BOC must provide interconnection. Staff asserts that unbundled network elements constitute the BOC's network facilities to which the requesting carrier must be allowed to interconnect, not the connecting carrier's own facilities.

Staff also argues that Ameritech's position ignores that the facilities-based competitor requirement imposed by Congress differentiates between the competitive provider's facilities and the BOC's facilities for purposes of assessing facilities-based competition. Staff contends that the issue of how the competitor acquired certain facilities misses the point. Staff states that the question which must be answered is whether the competitor is providing facilities-based service which does not rely on the BOC's facilities. Staff opines that Ameritech's concept of facilities versus non-facilities is not consistent with the concept of facilities which are and facilities which are not the provider's own. It contends that Ameritech's definition renders Congress's use of the term "own" virtually meaningless in as much as it does not allow for the possibility of "facilities" which are not the provider's own facilities. Staff opines that Ameritech's definition defines away the very distinction Congress was seeking to make, and is clearly not consistent with the intent of Congress.

Staff also makes the argument that the legislative history of the Act demonstrates that the intent of the facilities-based competitor requirement was to ensure that a BOC was facing facilities-based competition from a carrier using facilities not owned by the BOC. It cites the Conference Report which indicates that Congress believed that cable companies with their existing connection to 95% of the United States homes were likely to be the "facilities-based" competitors envisioned under Section 271(c)(1)(A). H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 147-48 (1996). Staff states that Congress' explicit

reference to cable companies which already own substantial facilities as the model "facilities-based competitor" hardly comports with Ameritech's contention that Congress intended a carrier providing service solely through use of the unbundled network elements of a BOC would satisfy the facilities-based competitor requirement.

AT&T contends that the plain language of Section 271(c)(1)(A) clearly contemplates two sets of "network facilities" such that the competing provider must have its own network facilities, and that leasing unbundled facilities from the BOC is not sufficient to satisfy this requirement. AT&T notes that the reason for the facilities-based requirement is clear. So long as the BOC controls the provision of network elements to CLECs, the CLEC is critically dependent upon the BOC in providing service to its end user customers. AT&T submits that only by a competitor actually owning and providing service via its own facilities can the BOC truly be disciplined by the marketplace as contemplated by Section 271(c)(1)(A).

Sprint contends that in order to be considered facilities-based, a competing carrier must be providing service using substantially more than 50% of facilities (including loops) that it actually owns as measured, e.g., by investment. Sprint points out that of the 7,000 access lines served by CCT, only 400 are served entirely through the use of its own facilities. Sprint further contends that there is no basis for Ameritech's equating of unbundled network elements with a competitor's own independent network. Sprint agrees with Staff that it would be nonsensical for this Commission to believe that a carrier with no independent network facilities should qualify as a "facilities-based" carrier. It also points out that Sections251(2)(3) and 252(d)(i) demonstrate that Congress was fully capable of referring explicitly to lease hold arrangements and chose not to. Thus, Sprint concludes that Ameritech has not satisfied the facilities-based requirement.

CompTel asserts that in the current environment, where Ameritech is not offering unbundled elements that comply with the Act, in terms of definition, pricing, and operational support, it is absurd to consider Ameritech's definition of facilities-based. It agrees with Ms. TerKeurst's position that Ameritech still has significant influence over the extent to which that network element is actually useful to the competing carriers. CompTel, therefore, concludes that Ameritech must make vast improvements in its offering of unbundled network elements before the Commission even should consider Ameritech's proposed definition of Section 271(c)(1)(A).

MCI argues that the term "own" should mean what it says: if a new entrant is using Ameritech facilities, it is not using its "own" facilities. MCI also submits that although predominantly means over 50%, a number of factors which focus on independence from Ameritech's facilities should be examined to determine if a carrier is predominantly using its own facilities.

Ameritech responds by stating that the arguments advanced by the IXCs reflect a transparent strategy to block additional competition in the long distance business by preventing Ameritech from ever obtaining interLATA authority. In particular, Ameritech states that Sprint's definition for "facilities-based" may never be satisfied.

Ameritech further states that Sprint's theory produces results that would completely frustrate the pro-competitive purposes of the Act. It contends that placing dispositive emphasis on loops, Sprint effectively ignores whether competing carriers have title to local switches, which could be viewed as more relevant in determining whether a competing carrier is predominantly facilities-based. Ameritech also states that Sprint's theory ignores the fact that the extent to which different carriers will construct new loops will vary on a carrier-by-carrier basis. It postulates that it is possible, for example, that a carrier may decide to self-provision nearly all of its network, but lease unbundled loops from Ameritech. Ameritech contends that although such a carrier would qualify as "predominantly facilities-based" under any rational standard, it would not under Sprint's theory.

Ameritech also takes exception to MCI's multi-factor test which it calls be unworkable in practice. It criticizes the fact that MCI does not say how the various factors should be weighed collectively, and even admits that one of the factors is simply unmeasurable. Ameritech states that MCI's proposal would not provide any guidance as to whether a competing carrier is predominantly facilities-based under Section 271(c)(1)(A), and would be unstable in application.

Commission Conclusion

The words "their own" refer to the facilities owned by the competing providers. This is the plain meaning of Section 271 (c)(1)(A). Leased facilities do not qualify as "their own" facilities. If Congress meant to include leased facilities, it would have stated so. There is no ambiguity present with respect to this language and, therefore, there is no need to look any deeper than the words of this Section.

The Commission agrees with Staff that "predominantly" should be interpreted to mean greater than 50%. That approach not only gives a common sense meaning to the word "predominantly," but also interprets that term in a manner which acknowledges the alternative standard Congress included in the statute -- exclusively.

The Commission also agrees with Staff that the proper measure for determining whether a carrier is predominantly facilities-based is using a relative-LRSIC analysis. Thus, for a carrier serving customers over its own facilities, unbundled loops, and resale, a weighted average based on the percent of the carrier's own facilities should be calculated. If the weighted average exceeds 50 percent, then the carrier is deemed serving customers predominantly over its own facilities.

However, due to insufficient information, we must rely on the information that Ameritech submitted regarding the embedded investment dollars of central office cable, wired loop investment, and other facilities-based investment. We accept Staff's analysis as reasonable and, thus, also conclude that CCT is serving customers predominantly over its own facilities. We agree with Staff that a determination with respect to MFS cannot be made in this record.

F. AMERITECH'S RELIANCE ON OTHER AGREEMENTS THROUGH MOST FAVORED NATIONS CLAUSES

Ameritech contends that its interconnection agreements with CCT, MFS and TCG each contain a "most favored nation" ("MFN") clause. It notes that pursuant to those MFN clauses, CCT, MFS and TCG and any other carrier with an interconnection agreement may order individual network elements or checklist items out of Ameritech's approved interconnection agreement with AT&T ("AT&T Agreement"). Ameritech states that the AT&T Agreement makes available all of the checklist items. It stresses that the Commission expressly has found that all of the rates, terms and conditions contained in the AT&T Agreement fully comply with Sections 251 and 252(d), and with the FCC's Regulations. Accordingly, Ameritech maintains that CCT, MFS and TCG have available to them all of the checklist items for immediate order, on rates, terms and conditions that fully comport with the Act. Ameritech adds that the rates, terms and conditions contained in its interconnection agreements with CCT, MFS and TCG fully comply with Sections 251 and 252(d). However, it notes that it would not matter even if that were not the case, because these carriers may order unbundled loops, or any other checklist item, out of the AT&T Agreement.

Staff refers to Ameritech's attempt to rely on other agreements through MFN clauses as an attempt to do indirectly what the 1996 Act prohibits on a direct basis. It states that this reliance on the AT&T Agreement is nothing more than a Track B approach in disguise. Staff maintains that Ameritech has not met the requirements to proceed under Track B. It further notes that with the language of Section 271(c)(1)(B) -- the Track B approach -- Congress allowed for the possibility of interLATA relief in situations where the BOC is offering only access and interconnection. Staff contends, however, that this "possibility" is subject to specific requirements which represent Congress' judgment as to the proper balancing of the diverse if not competing interest of BOCs, long distance companies and consumers. Staff argues that Ameritech has not demonstrated that it meets those requirements.

Staff further notes that MFN clauses are akin to the statutory requirement in Section 252(i) that ILECs make approved agreements available to all carriers. 47 U.S.C. §252(i). It contends that if Congress intended to allow BOCs to rely on the availability of other agreements to satisfy the conditions of Section 271(c)(1)(A), it would have provided for that potentiality. Staff maintains that, notwithstanding Congress' creation of a legislative MFN clause in Section 252(i), Congress specifically required in Section